82-1009

No. .....

In The

Supreme Court of the United States

October Term, 1982

THE STATE OF COLORADO,

Petitioner,

vs.

LEE ROY HENDERSHOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state constitutionally limit the admissibility of evidence of mental defect to specific-intent crimes without infringing on the presumption of innocence and without abridging the defendant's right to have every element of a criminal offense proved beyond a reasonable doubt?

2. Where the defendant is charged with a general-intent crime, may a state require that evidence of mental defect affecting his ability to form a general intent be introduced, if at all, only at a sanity trial?

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OPINIONS BELOW

The opinion of the Colorado Supreme Court is not yet reported, but is included as appendix A. The opinion of the district court is not reported, but is included as appendix D.

JURISDICTION

The judgment of the Colorado Supreme Court was issued on September 27, 1982 (A-1). The state's timely petition for rehearing was denied on October 18, 1982 (A-26). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1257 (3).

No adequate and independent state ground exists for the decision of the Colorado Supreme Court which would deprive this Court of jurisdiction. The Colorado Supreme Court cited both the federal and state constitutions. The analysis, however, is based on the United States Constitution and the decisions of this Court, especially *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). The Colorado court made no independent analysis under the Colorado constitution. Consequently, the mere citing of the Colorado constitution in the opinion does not constitute an adequate and independent state ground which would preclude this Court's review by writ of certiorari. *See Oregon v. Kennedy*, 102 S.Ct. 2083, 2087 (1982), "[T]he fact that the state court relied to the extent that it did on the federal grounds requires us to reach the merits." *See also Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 572 (1977).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

U.S. Const. amend. XIV, sec. (1), which states in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Colo. Rev. Stat. sec. 18-1-803 (1978), which states:

> Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent if such an intent is an element of the offense charged.

Colo. Rev. Stat. sec. 18-1-805 (1978), which states:

> The issue of responsibility under sections 18-1-801 to 18-1-804 is an affirmative defense.

The following Colorado statutes, which appear in appendix E to this brief (A-37):

Colo. Rev. Stat. sec. 16-8-101 through 105 (1978);

Colo. Rev. Stat. sec. 18-1-501 (1978);

Colo. Rev. Stat. sec. 18-1-502 (1978);

Colo. Rev. Stat. sec. 18-1-802 (1978);

Colo. Rev. Stat. sec. 18-3-204 (1978).

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STATEMENT OF THE CASE

On April 28, 1979, the respondent, Lee Roy Hendershott, was living with Patricia Styskal. Problems developed between them and Ms. Styskal told the respondent to move out. That evening, Ms. Styskal found the respondent waiting for her in her bedroom. He accused her of having been with another man, struck, kicked, and beat her. As a result, the respondent was charged in the Boulder County Court with knowingly or recklessly causing bodily injury to Ms. Styskal, in violation of Colo. Rev. Stat. 18-3-204 (1978), third-degree assault. Although

the respondent did not enter a plea of not guilty by reason of insanity, in the course of his jury trial on the merits, he attempted to introduce expert psychiatric testimony to show that he suffered from "adult minimal brain dysfunction" which could cause him to be "unconscious" or "completely out of control."[1] The prosecution, upon learning of the proposed defense, filed a motion *in limine*, arguing that as under Colorado law evidence of impaired mental ability short of insanity is only a defense to specific-intent crimes, Colo. Rev. Stat. 18-1-803 (1978), such evidence is irrelevant to a prosecution for third-degree assault, which, under Colorado law, is a general-intent crime (A-27).[2] The court granted this motion and refused to permit the respondent from introducing the offered testimony. The respondent was convicted and sentenced to 6 months in jail with credit for time served.

The respondent appealed to the Boulder District Court, which affirmed the conviction (A-30). The Colorado Supreme Court then granted the respondent's petition for writ of certiorari and reversed his conviction on the grounds that the trial court erred in not admitting the psychiatric testimony. The court held that the decisions in *In re Winship*, 397 U. S. 358 (1970), *Sandstrom v. Montana*, 442 U. S. 510 (1979), *Patterson v. New York*, 432 U. S. 197 (1977), and *Mullaney v. Wilbur*, 421 U. S.

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[1]A complete description of the offered defense is contained in footnote two of the Colorado Supreme Court's opinion (A-4-5).

[2]Under Colorado law specific-intent crimes are those with a *mens rea* of "intentionally" or with "intent." Crimes with a lesser *mens rea* (knowingly, willfully, recklessly, criminal negligence) are general-intent crimes. Colo. Rev. Stat. 18-1-501 (1978).

684 (1975), required that as a matter of due process, a criminal defendant be allowed to introduce evidence of impaired mental condition at the trial of a general-intent crime, even though his sanity was not at issue. Otherwise, the court held, the state's burden of proof on an element of a crime would be lessened, and the defendant's presumption of innocence undermined (A-8-10).

REASONS FOR GRANTING THE WRIT

Since John Hinckley was found not guilty by reason of insanity in the shooting of President Reagan, the question of to what extent the legislative branch may limit evidence of mental defect as a defense to criminal responsibility has been hotly debated.[3] The *Hendershott* case exemplifies the issues which underlie that debate.

The Colorado legislature has allowed a criminal defendant to raise the issue of impaired mental condition as an affirmative defense to specific-intent crimes. Colo. Rev. Stat. 18-1-803 (1978). It has not, however, allowed evidence of impaired mental condition to constitute a defense to general-intent crimes. *Id.*[4] In limiting the

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[3]*See, e. g.*, Kaufman, *The Insanity Plea on Trial*, New York Times, August 8, 1982, sec. 6 (Magazine), at 16; Dershowitz, *The Insanity Defense—Under Fire Again*, Washington Post, June 27, 1982; *Reforming the Insanity Defense*, State Legislatures, Oct. 1982, at 21. The Reagan administration's response is contained in proposed title I of the Criminal Justice Reform Act of 1982, S. 2903, H. R. 7117, 97th Cong. 2d Sess. (1982).

[4]Despite the plain language of the statute, in *Hendershott* the Colorado Supreme Court held that it would be unconstitu-

(Continued on next page)

defense of impaired mental condition to specific-intent crimes, the Colorado legislature has followed the federal rule, and the rule of many other states.[5] Despite the wide acceptance of this approach, the Colorado Supreme Court held in *Hendershott* that the restriction on evidence of impaired mental condition to specific-intent crimes violates the Constitution (A-2). This holding is in direct conflict with the decision of the highest court in at least one other state[6] and necessarily in conflict with other jurisdictions which find no constitutional infirmity in prohibiting the admission of impaired mental condition evidence to negate any *mens rea* element.[7]

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ional to construe the statute in such a manner as to prohibit the introduction of evidence of impaired mental ability in the prosecution of a general intent crime (A-16). Because the Colorado Supreme Court's construction was compelled by an erroneous interpretation of the United States Constitution, this case is appropriate for review by this Court. *Delaware v. Prouse*, 440 U. S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 572 (1977).

[5]*See, e. g., United States v. Busic*, 592 F. 2d 13 (2d Cir. 1978); *United States v. Brawner*, 471 F. 2d 969 (D. C. Cir. 1972); *United States v. Haseltine*, 419 F. 2d 579 (9th Cir. 1969), *overruled on other grounds, United States v. Bishop*, 412 U. S. 346, 351 (1973); *Mill v. State*, 585 P. 2d 546 (Alaska 1978), *cert. denied*, 444 U. S. 827 (1979); *People v. Gauze*, 15 Cal. 3d 709, 125 Cal. Rptr. 773, 542 P. 2d 1565 (1975); *State v. Barney*, 244 N. W. 2d 316 (Iowa 1976); *State v. Doyon*, 416 A. 2d 130 (R. I. 1980); *Cowles v. State*, 510 S. W. 2d 608 (Tex. Crim. App. 1974); *State v. Ferrick*, 81 Wash. 2d 942, 506 P. 2d 860, *cert. denied*, 414 U. S. 1094 (1973).

[6]*Mill v. State*, 585 P. 2d 546 (Alaska 1978), *cert. denied*, 444 U. S. 827 (1979).

[7]*Muench v. Israel*, 514 F. Supp. 1194 (1981); *State v. Steele*, 97 Wis. 2d 72, 294 N. W. 2d 2 (1980); *State v. Wade*, 375 So. 2d

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The questions at issue here are of vital importance to the development of the law with respect to a state's right to define the limits of criminal responsibility due to mental defect, a state's burden of proof on the elements of a crime, a defendant's right to present evidence in his behalf, and a state's right to limit the presentation of defense evidence in appropriate circumstances. The *Hendershott* decision tests the continuing viability of decisions such as *Fisher v. United States*, 328 U. S. 463 (1945) and *Leland v. Oregon*, 343 U. S. 790 (1952), in light of *In Re Winship*, 397 U. S. 358 (1970), *Mullaney v. Wilbur*, 421 U. S. 684 (1975) and *Patterson v. New York*, 432 U. S. 197 (1977). It presents another perspective on the question of the state's ability to limit the presentation of defense evidence, *see United States v. Nobles*, 422 U. S. 225 (1975); *Chambers v. Mississippi*, 410 U. S. 284 (1973); *Washington v. Texas*, 388 U. S. 14 (1967); and it presents the question unanswered in *Williams v. Florida*, 399 U. S. 78, 83 n. 14 (1970), whether the state may exclude defense evidence where the defendant has not complied with the procedure providing for its admission.

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97 (La. 1979), *cert. denied*, 445 U. S. 911 (1980). Other authorities refusing to admit evidence of impaired mental condition to disprove any *mens rea* element, even that of specific intent, include, *e. g.*, *Bethea v. United States*, 365 A. 2d 64 (D. C. App. 1976), *cert. denied*, 433 U. S. 911 (1977); *Bates v. State*, 386 A. 2d 1139 (Del. 1978); *Bradshaw v. State*, 353 So. 2d 188 (Fla. App. 1977); *Johnson v. State*, 439 A. 2d 542 (Md. App. 1982); *State v. Sikora*, 44 N. J. 453, 210 A. 2d 193 (1965); *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N. E. 2d 523 (1982).

ARGUMENT

I.

The decision below involves an important question of federal law not yet determined by this Court: May a state constitutionally prohibit the introduction of defense evidence of mental defect to disprove the mens rea element of a general-intent crime?

In *Fisher v. United States*, this Court rejected a bid to have a jury instructed that evidence of mental deficiency short of insanity could be considered in determining the accused's capacity for premeditation and deliberation. In doing so, this Court stated:

> No one doubts that there are more possible classifications of mentality than the sane and the insane . . . Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty. . . . It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility.
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> * * *
>
> Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of crim-

> inal law in matters not affected by Constitutional limitations . . . is a matter peculiarly of local concern.

328 U. S. at 475-76.

In *Leland v. Oregon*, the defendant was charged with first-degree murder. A jury rejected his insanity defense and found him guilty, a conviction which this Court affirmed. In so ruling, the Court held that it was not unconstitutional to place the burden of proof on the defendant to prove his sanity beyond a reasonable doubt. 343 U. S. at 800. Further, this Court upheld the constitutionality of an Oregon statute which provided that "morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor." 343 U. S. at 800, quoting Or. Comp. Laws sec. 23-122 (1940). Although the language of the Oregon statute upheld in *Leland* is perhaps archaic, the implication of the decision is clear: *If a defendant is not insane, the federal Constitution does not mandate that lesser mental defect constitutes a defense to the charge.* If a state may pass a statute which provides that evidence of impaired mental condition is not a defense to any crime (thereby making such evidence irrelevant), it may certainly pass a less severe statute which provides that impaired condition is only relevant to specific-intent crimes.

On the basis of *Fisher* and *Leland*, it would appear that the Colorado Supreme Court erred in determining that the Constitution requires evidence of impaired mental condition be admissible to negate a general-intent element of a crime. An exposition on this point is necessary, however, because of the challenge to the viability

of *Fisher* and *Leland* based on subsequent decisions requiring the prosecution to prove all elements of a crime beyond a reasonable doubt, *In Re Winship*, and prohibiting a state from placing the burden on a defendant charged with murder to prove he acted in a heat of passion, *Mullaney v. Wilbur*.

In *Hendershott*, the Colorado Supreme Court neither cited nor discussed *Fisher* and *Leland*, but relied instead on *Winship* and *Mullaney* in concluding that evidence of impaired mental condition must be admissible to contest the prosecution's proof of the *mens rea* element of a crime (A-8-9). In doing so, the Colorado court failed to recognize the significance of *Patterson v. New York* in reaffirming the *Fisher-Leland* principle that mental-defect evidence is distinct from evidence of *mens rea*.

In *Patterson*, a case decided subsequent to *Winship* and *Mullaney*, this Court upheld a New York statute which placed the burden on the defendant to prove that he acted while under "severe emotional distress," a mitigating factor to murder in New York. Over a vigorous dissent, this Court held that evidence of mental infirmity not rising to the level of insanity did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder." Such mental infirmity "constitutes a separate issue on which the defendant is required to carry the burden of persuasion." 432 U. S. at 206-07. Since impaired mental condition is an affirmative defense and under *Patterson* distinct from the elements of the offense, the Colorado Supreme Court's analysis is incorrect. As the Colorado Supreme Court's opinion shows, *Winship* and *Mullaney* have created confusion in the lower

courts as to the application of *Fisher* and *Leland*. This confusion has not been eliminated by *Patterson v. New York*. *See McElroy v. Holloway*, 451 U.S. 1028 (1981), (Rehnquist, J., dissenting from the denial of certiorari). The Court should grant this petition to end this confusion.

II.

The decision below involves a second important federal question: Does the Federal Constitution prohibit a state from requiring that evidence of mental defect affecting an accused's ability to form a general intent be introduced, if at all, only at a sanity trial.

This case also raises the question of whether a state may restrict the *manner* of presentation of defense evidence. The Colorado Supreme Court viewed the evidentiary proscription on the admissibility of impaired-mental-condition evidence to be tantamount to the preclusion of relevant, reliable evidence, the effect of which was to undermine a defendant's presumption of innocence and lessen the state's burden of proof (A-10). Colorado, like many other states,[8] has developed a bifurcated proceeding in which a sanity trial is conducted separately from a trial on the merits. Colo. Rev. Stat. 16-8-103, 104, 18-1-802 (1978). The state's burden at the sanity proceeding

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[8]By statute: Cal. Penal Code sec. 1026 (West Supp. 1982); Wis. Stat. Ann. sec. 971.175; by case law; e. g., *Nielsen v. State*, 623 P. 2d 304 (Alaska 1981); *Garrett v. State*, 320 A. 2d 745 (Del. 1974); *People v. Donaldson*, 65 Mich. App. 588, 237 N. W. 2d 570 (1975); *State v. Novosel*, 115 N. H. 302, 339 A. 2d 16 (1975); *State v. Khan*, 175 N. J. Super. 72, 417 A. 2d 585 (1980); *Commonwealth v. Murphy*, 493 Pa. 35, 425 A. 2d 352 (1981); *State v. Bragg*, 235 S. E. 2d 466 (W. Va. 1977).

is to prove the individual sane beyond a reasonable doubt. Colo. Rev. Stat. 16-8-105(2) (1978). The sanity standard in Colorado encompasses whether an individual could be aware of the nature and consequences of his acts, Colo. Rev. Stat. 16-8-101,[9] precisely that which is involved in the notion of general intent envisioned by the Colorado statutory scheme. Colo. Rev. Stat. 18-1-501. An accused, therefore, is not precluded from introducing evidence of mental defect or condition affecting his ability to form a general intent; he is merely restricted to presenting it at the sanity hearing, if at all.

As *United States v. Nobles, Chambers v. Mississippi,* and *Washington v. Texas* point out, the defendant's right to introduce evidence is not absolute. A state may limit the presentation of defense evidence provided the limitations imposed are not arbitrary. *Washington v. Texas,* 388 U.S. at 24-25 (Harlan, J., concurring). Here, the state has limited a defendant's right to present evidence of mental defect affecting his ability to form a general intent only insofar as it requires that the evidence be presented at a sanity hearing. The state's burden of proof on the issue is not lessened below that of beyond a reasonable doubt. Because the issue normally generates a battle of experts testifying to disputable theories or applications of theories, it is proper to require that this evidence be raised in a separate proceeding at which the

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[9]Colorado follows the *M'Naghten* rule as modified by the irresistible impulse test. Colo. Rev. Stat. 16-8-101 (1978); *Castro v. People,* 140 Colo. 493, 346 P. 2d 1020 (1959). The *M'Naghten* part of the insanity standard involves the inability to know the nature and consequences of one's act. R. Perkins, *Criminal Law* (2d ed. 1969) at 860.

issue is isolated for the jury's sole attention. The focusing of an issue requiring specialized testimony at a separate hearing can hardly be deemed an arbitrary restriction on the presentation of evidence.

The question then becomes whether a defendant may be precluded from subsequently introducing this type of evidence at the trial on the merits, either because he introduced it once at the appropriate time, or because he bypassed the opportunity to do so. Nothing in the Constitution guarantees an individual the right to introduce evidence twice; and where, as here, legitimate policies underlie a decision to have the issue separated for consideration, an individual ought not be able to bypass the appropriate procedures for its admission.

This case presents a question left unanswered in *Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, this Court upheld, as legitimate, a reciprocal notice-of-alibi statute but reserved ruling on whether and to what extent a state could enforce its discovery rules by precluding relevant, probative defense evidence. 399 U.S. at 83 n. 14. *See also Wardius v. Oregon*, 412 U.S. 470, 472 n. 4 (1973). Here, if the respondent had wished to contest his ability to form a general intent or wished to argue that his mental defect left him "completely out of control," he could have done so by pleading not guilty by reason of insanity. Colo. Rev. Stat. 16-8-104 (1978). This method of confession and avoidance, however, from a defendant's point of view has a serious defect. Since by entering such a plea, he is admitting his dangerousness, if a jury finds him to be not guilty by reason of insanity, he will be committed to the Colorado Department of Institutions (the state hospital) for treatment. Colo. Rev.

Stat. 16-8-105(4) (1978). This is a rational system, one which is necessary for the preservation of the public safety. *People v. Chavez,* 629 P. 2d 1040 (Colo. 1981).

The effect of the *Hendershott* decision, however, is to make the not-guilty-by-reason of-insanity plea superfluous. Under this decision a criminal defendant may now introduce exactly the same evidence he would have introduced at a sanity trial, but if he prevails, he leaves the courtroom a free man. The Colorado legislature never intended such a result, and the Constitution does not require it.

CONCLUSION

Hendershott provides a logical sequel to the *Mullaney-Patterson* and *Washington - Chambers - Nobles - Williams* lines of cases. In *Mullaney* and *Patterson* the Court considered whether the state could shift the burden of proof in dealing with mental ability as it affects criminal liability; in *Washington, Chambers,* and *Nobles* the Court considered when a state could appropriately limit the presentation of defense evidence; and in *Williams* the Court left open the question of the propriety of excluding defense evidence where a defendant has failed to comply with the procedures for its admission. The questions presented by *Hendershott,* (1) whether a state may require that evidence of mental ability be limited to a separate sanity trial, and (2) whether a state may bar the admission of such evidence if the defendant fails to enter a plea of not guilty by reason of insanity, follow this

sequence of cases. Because these are important Constitutional questions, Colorado asks this Court to issue a writ of certiorari.

Respectfully submitted,

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